

EXHIBIT C



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Transcript of Dr. Yoram (Jerry) Wind

Date: September 20, 2018

Case: Video Gaming Tech -v- Castle Hill Studios

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Conducted on September 20, 2018

4 (13 to 16)

<p>3</p> <p>1 A. For the second report, I did not have 2 Research Now involved. 3 Q. What does Wind Associates do in addition 4 to your expert witness services? 5 A. Consulting to various firms. Being on 6 advisory boards of various firms, I gave lectures, 7 seminars. 8 Q. In Appendix G of your opening report, if 9 you could turn to that. 10 MR. ROMAN: What is Appendix G? 11 Q. It's the list of materials relied on -- 12 I'm sorry, deposition of prior testimony. 13 A. Yes. 14 Q. Appendix G of your report, Exhibit 1, 15 you list cases in which you've given trial and 16 deposition testimony between 2014 and 2018; is 17 that correct? 18 A. Correct. 19 Q. Is that complete? 20 A. Yes, as far as I know. 21 Q. How many cases would you estimate you've 22 given expert trial or deposition testimony in your 23 career? 24 A. Probably over 50. 25 Q. Over 50?</p>	<p>5</p> <p>1 expert on the gaming industry? 2 A. No. 3 Q. I know you've written dozens of books 4 and articles over the years. Have any of them 5 been about the gaming industry? 6 A. No. 7 Q. And it may be obvious from the last 8 question, have any of them been about the Oklahoma 9 gaming market? 10 A. No. 11 Q. Have any of them been about Oklahoma in 12 general? 13 A. No. 14 Q. Of these cases where you were an expert 15 over the years in either trial or deposition 16 testimony, how many involved claims of trademark 17 or trade dress infringement? 18 A. I don't know. I don't keep track of 19 these. 20 Q. Well, if you could just look at exhibit 21 G, we'll limit it to 2014 to 2018. Can you tell 22 me which of those involved trademark or trade 23 dress infringement claims. 24 A. I'm trying to remember. Unlike you 25 lawyers, you remember every case, the minute I</p>
<p>4</p> <p>1 A. Yes. 2 Q. And how many of those cases did you 3 testify at trial? 4 A. I have no idea. Probably over ten. 5 Q. And were any of your opinions or your 6 reports in any of these cases the subject of a 7 Daubert motion? 8 A. None that I know that have been accepted 9 as a Daubert. 10 Q. Were any of your opinions or reports 11 excluded by any court? 12 A. No, not that I know of. 13 Q. So you're unaware of any opinion or 14 report of yours ever being excluded? 15 A. Correct. 16 Q. And have you ever been not qualified as 17 an expert witness by a court? 18 A. No. 19 Q. What about an administrative tribunal? 20 A. Not that I know of. 21 Q. Now, in all these cases you've done in 22 your career, other than this one, have any of them 23 involved the gaming industry? 24 A. No. 25 Q. And do you consider yourself to be an</p>	<p>6</p> <p>1 finish a case, I forget it. 2 Q. Take your time. 3 A. I really don't -- you know, it's hard 4 time to remember the specifics. I would say about 5 a third of them probably were trademark, but I 6 could not tell you which specific ones. 7 Q. So about a third of the cases you've 8 listed where you had trial and deposition 9 testimony between 2014 and 2018 in exhibit G, 10 about a third of them had to do with trademark 11 infringement; is that what you're saying? 12 A. That's my best guess. I really don't 13 remember each one of them. 14 Q. What about trade dress infringement? 15 A. I probably couldn't part this, you know, 16 part the trade -- trademark, trade dress. 17 Q. And you understand the distinction 18 between trademark and trade dress, sir? 19 A. Yes. 20 Q. Of the trademark and trade dress 21 infringement cases that you've done over the 22 years, approximately what percentage were on 23 behalf of the plaintiff? 24 A. I have no idea. 25 Q. Is it fair to say you don't know the</p>

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<p style="text-align: right;">4</p> <p>1 management did not rely much on those studies, did 2 not see much value on them and decided not to -- 3 not to continue them. 4 Q. Do you recall speaking with Mr. North 5 about anything else? 6 A. Not as I sit here now. 7 Q. Have you had any conversations with 8 anybody else from VGT? 9 A. No. 10 Q. In the preparation of your rely report, 11 did you speak with anybody from VGT? 12 A. No. 13 Q. Now, I notice in Appendix H of your 14 initial report, you cite just above the telephone 15 conference with Mr. Ryan, you cite, VGT, quote, 16 about VGT, and then there's a web address; do you 17 see that? 18 A. Yeah. 19 Q. Did you review any VGT web pages besides 20 this particular page? 21 A. No. But basically, it's not a single 22 page, it's, you know, because they looked at their 23 website. 24 Q. You looked at the whole website? 25 A. Whole website.</p>	<p style="text-align: right;">43</p> <p>1 Q. My question was related just to the 2 website, though. 3 A. I saw what was on the website. 4 Q. Okay. Do you recall approximately how 5 many different games VGT has on its website? 6 A. No. 7 Q. Did you look at the games that they 8 have? 9 A. I skimmed the website and focused on 10 specific things that I thought were relevant at 11 the time. 12 Q. How did you know what was relevant 13 before you reviewed their website? 14 A. Relevant to what I was looking for. I 15 was looking for basically trying to get a feel for 16 the product that they have. 17 Q. So in addition to the pictures, did you 18 review any of the pages on VGT's website that 19 described the different types of games VGT 20 markets? 21 A. Yeah, whatever was there, I looked at 22 the website. 23 Q. And did you review the pages on VGT's 24 website describing the different types of game 25 cabinets it uses for its games?</p>
<p style="text-align: right;">42</p> <p>1 Q. So why did you limit your citation and 2 list of materials reviewed just to the page about 3 VGT? 4 A. I guess that's what I was thinking at 5 the time. But I actually looked at the entire 6 website. 7 Q. You looked at the entire website. And 8 did you review any of the pictures or descriptions 9 of VGT's games on its website? 10 A. Yeah, I definitely looked at some of the 11 pictures they had there. 12 Q. Did you think it was important in 13 formulating your survey or your opinions in this 14 case to look at the VGT games on its website? 15 A. Yes. 16 Q. And you didn't list that in your report, 17 though? 18 A. Well, I think that we do mention we 19 bring a number of examples, actually, of -- to 20 various pictures that we saw. I think I've listed 21 them somewhere. 22 There was a lot of pictures, also, 23 in the complaint. There are -- there are a lot of 24 pictures throughout, so there's tons of pictures 25 that I've seen.</p>	<p style="text-align: right;">44</p> <p>1 A. Yes. 2 Q. And what do you recall about that? 3 A. The number of cabinets. But then there 4 was one that we selected for the study seemed to 5 be the best-selling cabinet and machine. It's not 6 only the cabinet, but the totality of the machine. 7 Q. And what do you mean by that? 8 A. Well, it's not only the cabinet, it's 9 the -- you know, when you say -- when you look at 10 the product, if it's the best-selling product they 11 have, it's not only the cabinet, it's the totality 12 of the offering of the machine and everything 13 there. 14 Q. So you mean not just the structural 15 cabinet itself, you're talking about the whole 16 machine in that particular cabinet? 17 A. Correct. 18 Q. All right. My question is, did you look 19 at the whole machine that they have in their games 20 in different cabinet frames? 21 A. Whatever they had on the website I 22 looked at. 23 Q. Did you think that was important? 24 A. Yeah, I think, like, basically, you 25 know, everything I looked at was important to try</p>

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<p style="text-align: right;">49</p> <p>1 it was my final decision what stimuli were to be 2 included. 3 Q. All right. So you narrowed it down to 4 IGT, Scientific Games and Konami, correct? 5 A. Correct. 6 Q. And how did you decide which game to use 7 from IGT, Scientific Games and Konami, were those 8 recommendations from Plaintiff's counsel? 9 A. Yes, I relied to a larger set of them 10 because it was primary two considerations if we 11 look at a number of different options. One is the 12 one which are, you know, basically, you know, have 13 characteristics that would have some in common 14 with the test ones that I wanted to look at, the 15 VGT and CHG. And two, that we had available 16 pictures, there was a huge issue in this case to 17 try to find out the actual visual stimuli to be 18 able to show respondent. 19 Q. And you said you considered various 20 options. What other options did you consider but 21 reject? 22 A. I don't remember now. There were a 23 number of -- look at a product, you know, 24 different machines, and we look for the one that 25 will be basically, you know, some similar elements</p>	<p style="text-align: right;">5</p> <p>1 there, didn't you, or did you peruse everything 2 that they had on their website? 3 A. I did not spend hours looking at each 4 one of their websites. 5 Q. So what specifically were you looking at 6 on their website? 7 A. Some of the pictures of the machines it 8 had. 9 Q. And how did you figure out where to go 10 on their website, what factors were you taking 11 into account? 12 A. What do you mean by what factors? I was 13 looking at their website, at the different product 14 that they had, and we were looking basically -- 15 you know, a while on the phone call to try to 16 narrow down the product, trying to look at what 17 other products are there. 18 Q. So in deciding what stimuli to use, you 19 were on the phone with attorneys from Covington & 20 Burling? 21 A. I think it was Rebecca, yeah. 22 Q. Okay. And what did Rebecca tell you 23 about stimuli that you should use in your survey? 24 A. I don't think they said, you know, what 25 I should use. She basically suggested we</p>
<p style="text-align: right;">50</p> <p>1 to the VGT and CHG. 2 Q. When you -- 3 A. These were the ones. And also, major 4 consideration was as I said before, is the 5 availability of pictures that we could use. 6 Q. And you said you reviewed IGT, 7 Scientific Game and Konami's websites in 8 preparation of your report even though you didn't 9 list it in Appendix H. Was that before or after 10 you and Plaintiff's counsel selected which games 11 to put in the survey? 12 A. About the same time. 13 Q. What does that mean, about the same 14 time? 15 A. Well, during the discussion of the 16 specific machines, I opened the website and looked 17 at them. 18 Q. Do you recall if you reviewed IGT's 19 website to see their different games and game 20 cabinets that they offered? 21 A. Whatever they had on the -- on the 22 website at the time. 23 Q. Well, these are huge companies with huge 24 websites with hundreds, if not thousands, of 25 pages. You looked at something very specific in</p>	<p style="text-align: right;">52</p> <p>1 basically -- it's like sequencing process that I 2 think was supplied in my rebuttal report. You 3 know, what is the anchor, what is the best-selling 4 VGT machine. We found this. Then what will be 5 the comparable machine to CHG tried to copy from 6 VGT based on their documents. So we found this. 7 And then once you anchor on this, 8 then looking for three other products that have 9 some similar characteristics to these two, that's 10 the process we're answering. 11 Q. Okay. As you sit here today, do you 12 recall any specific pages on or games that you 13 viewed on IGT's website? 14 A. No. 15 Q. As you sit here today, did you review 16 any specific pages or games that you looked at on 17 Scientific Games' website? 18 A. No. 19 Q. As you sit here today, do you recall any 20 specific games or pages that you reviewed on 21 Konami's website? 22 A. No. 23 Q. As you sit here today, do you recall any 24 games on IGT's website or how many games on IGT's 25 website had the word "money" in it?</p>

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<p>57</p> <p>1 Scientific Games that had the name -- the word</p> <p>2 "money" in its title that you chose not to use for</p> <p>3 other reasons?</p> <p>4 A. I don't recall.</p> <p>5 Q. But it's possible?</p> <p>6 MR. ROMAN: Object to the form.</p> <p>7 Q. When you reviewed Scientific Games'</p> <p>8 website, do you recall whether it had any class II</p> <p>9 games?</p> <p>10 A. I don't recall at this stage.</p> <p>11 Q. Was that something that you considered?</p> <p>12 A. We looked at primarily class II, but</p> <p>13 also class III machines.</p> <p>14 Q. So as you sit here today, do you know</p> <p>15 whether Scientific Games has any class II machines</p> <p>16 on its website?</p> <p>17 A. I don't recall.</p> <p>18 Q. And as you sit here today, do you</p> <p>19 know or do you recall whether Konami had any class</p> <p>20 II games on its website?</p> <p>21 A. Same answer.</p> <p>22 Q. I'm sorry?</p> <p>23 A. Same answer.</p> <p>24 Q. You don't know?</p> <p>25 A. I don't recall.</p>	<p>59</p> <p>1 Q. In making your selections, did you have</p> <p>2 a preference as to whether or not the control</p> <p>3 stimuli were class II or class III?</p> <p>4 A. I wanted to make sure that the five --</p> <p>5 the five machines included some class II and some</p> <p>6 class III.</p> <p>7 Q. So you deliberately put some class III</p> <p>8 in the array?</p> <p>9 A. Correct.</p> <p>10 Q. Did you review Konami's website to see</p> <p>11 if it had any three-reel mechanical games to use</p> <p>12 in your survey instead of a video machine?</p> <p>13 A. I don't recall at this stage.</p> <p>14 Q. Was that an important factor in</p> <p>15 determining which stimuli to use as controls,</p> <p>16 whether or not they were three-reel mechanical,</p> <p>17 five-reel mechanical or video?</p> <p>18 A. I think it was one of the</p> <p>19 considerations.</p> <p>20 Q. Do you know what I mean when I say three</p> <p>21 or five-reel mechanical machine?</p> <p>22 A. Vaguely. I'm not a gambling expert on</p> <p>23 this machine, but I heard the term many times.</p> <p>24 Q. And do you know what I mean by a video</p> <p>25 machine?</p>
<p>58</p> <p>1 Q. Was that an important factor you used in</p> <p>2 determining which pictures to use in your array?</p> <p>3 A. Well, we wanted to include a product</p> <p>4 that had both class II and class III.</p> <p>5 The key criteria was to have all</p> <p>6 these machines present in one casino. So we're</p> <p>7 basically -- you narrow it pretty much when you</p> <p>8 make sure that the machines are only those</p> <p>9 available of that specific casino and pictures are</p> <p>10 available of them.</p> <p>11 Q. All right. Do you believe that it's</p> <p>12 difficult to find different class II machines in</p> <p>13 Indian casinos in Oklahoma?</p> <p>14 MR. ROMAN: Object to the form.</p> <p>15 A. That's not what I said.</p> <p>16 Q. I'm sorry?</p> <p>17 A. That's not what I said. I said we're</p> <p>18 looking for the machines -- the machines that we</p> <p>19 selected had all to be in one casino.</p> <p>20 Q. In Oklahoma?</p> <p>21 A. In Oklahoma. And in one casino. Not</p> <p>22 across casinos. And we had to have pictures</p> <p>23 available for them that we could use. These were,</p> <p>24 you know, pragmatic, critical considerations in</p> <p>25 the selection.</p>	<p>60</p> <p>1 A. Yes.</p> <p>2 Q. What is your understanding?</p> <p>3 A. I think so the video -- large video</p> <p>4 component as part of the machine.</p> <p>5 Q. So where did you get the images of the</p> <p>6 various machines you show on page seven of your</p> <p>7 survey?</p> <p>8 A. Rebecca got it for us. Originally, I</p> <p>9 actually wanted to get videos and not just still</p> <p>10 machines -- photographs, but this was the best we</p> <p>11 could get of these machines.</p> <p>12 Q. Now, if you look at page seven, I think</p> <p>13 you're already there, at the pictures.</p> <p>14 A. Yeah.</p> <p>15 Q. You don't provide a source for those</p> <p>16 pictures, do you?</p> <p>17 A. You're correct.</p> <p>18 Q. Why is that?</p> <p>19 A. I guess oversight.</p> <p>20 Q. And you said these pictures were picked</p> <p>21 by Rebecca Dalton, counsel for Plaintiff?</p> <p>22 A. Provided by her. We -- as I discussed</p> <p>23 before, it was a process where I was with her on</p> <p>24 the phone a number of times in trying to select</p> <p>25 the product. We went through the process, then</p>

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<p>09</p> <p>1 some reward at the end of this, and the pay table 2 tells them basically how much are they going to 3 get in the game. 4 Q. Based on what's on the reels? 5 A. Right, based on various sequencing of 6 the reels. 7 Q. And what does that have to do with 8 bingo? 9 MR. ROMAN: Object to the form. 10 A. The game is a bingo-based game. 11 Q. What does that mean? 12 MR. ROMAN: Object to the form. 13 Q. If you don't know, you don't know. 14 A. So multiple -- my understanding of bingo 15 is multiple people playing bingo, and basically, 16 to the extent that you have a hit, it sort of 17 shows there and you get some payout for this. 18 But, again, I'm not the right respondent for this. 19 Q. Now, you said you conducted a study for 20 people who play or intend to play these machines 21 in Oklahoma casinos. Why did you limit your study 22 to Oklahoma casinos? 23 A. My understanding is that that's where 24 the bulk of the market is. 25 Q. Do you know how many states VGT has</p>	<p>1 about the empirical study. But the last sentence 2 in the first paragraph of section 4A states, in 3 particular, the study seeks to determine the rate 4 of confusion due to the similar look of the 5 company's trademarks, trade dress or both; do you 6 see that? 7 A. Yes. 8 Q. You then drop a footnote in saying that 9 it bears mention that because the experiment used 10 static images, not video or audio of the EGMs, it 11 does not offer insight into any additional 12 confusion that might be caused by the sound of the 13 machines, the feel of the game play, or the use of 14 the free spin features. 15 That's a true statement? 16 A. Yes. 17 Q. You then speculate that had we been able 18 to include these additional features in the study, 19 it is possible that there would have been even 20 greater levels of confusion among the respondents 21 as I understand that VGT alleges that these 22 features also are similar between the VGT and CHG 23 EGMs. 24 A. Correct. 25 MR. ROMAN: Is there a question or</p>
<p>0</p> <p>1 games in? 2 A. Yes, but I think we looked primarily at 3 markets where both -- both VGT and CHG had 4 machines. 5 Q. Do you know how many states Castle Hill 6 has games in? 7 A. No. I think I saw somewhere that 8 Oklahoma and one casino in Texas, but I'm not 9 sure. 10 Q. Do you know if there's casinos in which 11 VGT has games but Castle Hill doesn't? 12 A. Yes, my recollection of numbers is like 13 there are 55 casinos in Oklahoma, something like 14 this, and 51 of the 55 have CHG machines in them. 15 Q. What about outside of Oklahoma? 16 A. I think that CHG, my best understanding 17 is that they have only one casino outside of 18 Oklahoma and Texas. 19 Q. It's your belief that Castle Hill has 20 one casino outside of Oklahoma? 21 A. That's my recollection from the various 22 material. 23 Q. On pages five to six of the report, you 24 say a little bit more about your objectives. You 25 state -- again, you talk about the same statement</p>	<p>2</p> <p>1 not? 2 Q. No, I'm just pointing this out. 3 The question is, since you did not 4 study those issues, isn't it fair to say that it's 5 also possible that there would have been lower 6 levels of confusion based on the actual sound, 7 look and feel of those other features -- 8 MR. ROMAN: Object to the form. 9 Q. -- since we're speculating? 10 A. No. I'm going with based on my 11 assumption here is the fact that CHG tried to copy 12 VGT. 13 Q. But isn't that circular, sir? You're 14 saying they're the same because they tried to copy 15 it; isn't that what you're saying? 16 A. But circular, you know, the logic here 17 is very simple. You know, there are a number of 18 items here we were not able to capture in the 19 stimuli. These items, which we did not capture, 20 were items that CHG tried to copy from VGT. If 21 they basically copied them, then this would be 22 greater similarity between the two machines on 23 these dimensions as well; and therefore, the one 24 direction that you would expect is that our 25 confusion level is underestimating additional</p>

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<p>3</p> <p>1 confusion.</p> <p>2 Q. Dr. Wind, if you think that the evidence</p> <p>3 clearly shows that Castle Hill copied all the</p> <p>4 elements of the trade dress and the look and feel</p> <p>5 of the machines based on what you reviewed, why</p> <p>6 did you bother to do a confusion study?</p> <p>7 A. Because to try to determine confusion or</p> <p>8 not, you need consumers' perceptions.</p> <p>9 Q. So if you didn't test confusion --</p> <p>10 MR. ROMAN: He was still answering</p> <p>11 the question.</p> <p>12 Q. I'm sorry, go ahead.</p> <p>13 A. And we did -- we basically did the study</p> <p>14 on those elements that we could measure. And we</p> <p>15 could measure the reaction to the picture. We</p> <p>16 could not measure the reaction to other elements.</p> <p>17 So I feel very comfortable with</p> <p>18 concluding the level of confusion we had based on</p> <p>19 the stimuli we had in the study. But then given</p> <p>20 the fact that there are other elements that we</p> <p>21 were not able to capture in the study, basically,</p> <p>22 I feel confident to say that if CHG has been</p> <p>23 successful in copying these features of VGT, one</p> <p>24 would expect to have greater similarity between</p> <p>25 the two and therefore greater level of confusion.</p>	<p>5</p> <p>1 copying these other elements that we were not able</p> <p>2 to measure in copying VGT, then my estimate of</p> <p>3 confusion here is underestimating the real level</p> <p>4 of confusion in the marketplace.</p> <p>5 Q. And that's your opinion based on the</p> <p>6 documentation and evidence provided by VGT's</p> <p>7 attorneys and not based on a survey?</p> <p>8 A. Right, the conclusion, the additional</p> <p>9 conclusion in terms of what would be -- if you</p> <p>10 want to project beyond the survey, you know, we</p> <p>11 have a solid, strong evidence of confusion based</p> <p>12 on the visual stimuli we presented to consumer.</p> <p>13 If you ask me then the question</p> <p>14 what would be the projection for real level of</p> <p>15 confusion in the marketplace based on other</p> <p>16 characteristic that the survey was not able to</p> <p>17 capture, then the answer is relatively</p> <p>18 straightforward. If CHG has been successful in</p> <p>19 copying VGT as they intended based on the document</p> <p>20 that I have seen, and I have not seen other</p> <p>21 document that suggested they did not try to copy,</p> <p>22 then my estimate of confusion is underestimating</p> <p>23 the real level of confusion in the marketplace.</p> <p>24 MR. PLATT: Let's take a break.</p> <p>25 THE VIDEOGRAPHER: Off the record</p>
<p>4</p> <p>1 That's the basis for my footnote.</p> <p>2 Q. Well, that goes back to my question,</p> <p>3 which is if you think that the evidence is so</p> <p>4 clear based on what you've been provided from</p> <p>5 VGT's attorneys that VGT copied the look and feel</p> <p>6 of all of the machines in all of the titles that</p> <p>7 are at issue in this case, then -- and that you</p> <p>8 believe is enough evidence for you to form your</p> <p>9 opinion that the -- because they intentionally</p> <p>10 copied, they're confusingly similar, the question</p> <p>11 is why did you bother to do a survey at all?</p> <p>12 A. Because you --</p> <p>13 MR. ROMAN: Object to the form.</p> <p>14 A. Because you need consumer surveys. It's</p> <p>15 not my perceptions that governs it. What governs</p> <p>16 if there is confusion or not are consumers'</p> <p>17 perceptions.</p> <p>18 Q. Got it.</p> <p>19 A. And we did consumers' perceptions on</p> <p>20 whatever we could, and this is the base.</p> <p>21 Q. Okay.</p> <p>22 A. Now, there are elements that we were not</p> <p>23 able to test. So as opposed to just ignoring</p> <p>24 them, I am basically suggesting in this footnote</p> <p>25 to the extent that CHG has been successful in</p>	<p>6</p> <p>1 at 10:48.</p> <p>2 (Recess.)</p> <p>3 THE VIDEOGRAPHER: We're back on</p> <p>4 the record 10:59.</p> <p>5 CONTINUED EXAMINATION BY MR. PLATT:</p> <p>6 Q. Dr. Wind, let's talk about the confusion</p> <p>7 study itself. What exactly were you trying to</p> <p>8 determine in this study?</p> <p>9 A. If there is confusion, and if there is,</p> <p>10 what the level of confusion.</p> <p>11 Q. Confusion between what?</p> <p>12 A. Between the two, two firms, the VGT and</p> <p>13 CHG.</p> <p>14 Q. You were asking participants to decide</p> <p>15 whether there was any confusion between Mr. Money</p> <p>16 Bags in a particular cabinet and format with</p> <p>17 Castle Hill's game New Money in a particular</p> <p>18 cabinet.</p> <p>19 A. Correct.</p> <p>20 MR. ROMAN: Object to the form.</p> <p>21 Q. Correct, sir?</p> <p>22 A. Correct.</p> <p>23 Q. And what kind of study did you conduct,</p> <p>24 is there a term of art?</p> <p>25 A. It's a -- it's a confusion study, you</p>

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<p>7</p> <p>1 know, basically with multiple stimuli that</p> <p>2 assesses the confusion at the individual level.</p> <p>3 Q. So was a Squirt survey or an Eveready</p> <p>4 survey?</p> <p>5 A. A Squirt.</p> <p>6 Q. Can you explain the difference between</p> <p>7 an Eveready and a Squirt survey.</p> <p>8 A. Eveready, we're talking about stimuli</p> <p>9 and we're asking people in a test group, you know,</p> <p>10 basically the same typical confusion questions,</p> <p>11 the same confusion questions we ask here, and you</p> <p>12 have the control group that you're showing them</p> <p>13 another stimuli and asking them for those three</p> <p>14 sets of questions.</p> <p>15 In the Squirt, you're showing</p> <p>16 people a comparative set of basically the two</p> <p>17 items you're interested in, plus some other</p> <p>18 control items. That's what I've done here.</p> <p>19 Q. When you're doing a Squirt survey, are</p> <p>20 you trying to recreate how consumers would</p> <p>21 encounter the products in the marketplace?</p> <p>22 A. Yes.</p> <p>23 Q. Is it your opinion that -- well, let me</p> <p>24 back up.</p> <p>25 What would be the deciding factor</p>	<p>9</p> <p>1 stimuli, the dominant product in this product</p> <p>2 line, because that's the one that most people are</p> <p>3 familiar with, that's the one that's been the most</p> <p>4 successful.</p> <p>5 Q. Is it your opinion that VGT has strong</p> <p>6 marks?</p> <p>7 A. Yes.</p> <p>8 Q. Turn to page 25 of your report. In the</p> <p>9 top sentence you say, here there is evidence</p> <p>10 suggesting that the trademarks and trade dress of</p> <p>11 VGT's EGMs are strong, correct?</p> <p>12 A. Yes.</p> <p>13 Q. And then on the next page you say,</p> <p>14 fifth, consumer opinion data derived from studies</p> <p>15 conducted at the request of VGT in the course of</p> <p>16 its regular business support the conclusion that</p> <p>17 VGT's trademarks and trade dress are well known</p> <p>18 among relevant consumers. Why do you say that?</p> <p>19 A. It's a fact.</p> <p>20 Q. And you base that on what studies?</p> <p>21 A. These are the studies that VGT</p> <p>22 commissions especially in the time periods 2011,</p> <p>23 '12. I think some of them are even earlier.</p> <p>24 Q. Did those studies analyze the strength</p> <p>25 of the particular trademarks that we listed before</p>
<p>8</p> <p>1 for you or factors for you as to whether to</p> <p>2 perform an Eveready survey as opposed to a Squirt</p> <p>3 survey?</p> <p>4 A. The market kind of realty here with</p> <p>5 casino where people are confronted with a lot of</p> <p>6 machines, and it makes sense to show them the two</p> <p>7 machines in question in the context of a few</p> <p>8 others. So given this, this was kind of the</p> <p>9 natural selection for design.</p> <p>10 And that's the reason also that in</p> <p>11 selecting the stimuli they were spending a lot of</p> <p>12 time on earlier this morning was important that</p> <p>13 all five machines that we selected, the two tests</p> <p>14 and the three controls were available in the same</p> <p>15 casino.</p> <p>16 Q. You chose casinos where VGT, and in</p> <p>17 particular, Mr. Money Bags, as opposed to any of</p> <p>18 their other games, is the most prominent?</p> <p>19 A. Correct.</p> <p>20 Q. Why did you pick the most prominent</p> <p>21 game?</p> <p>22 A. Whenever you have a large product line,</p> <p>23 the question is, you know, what -- what are the</p> <p>24 stimuli you're going to select. And the natural</p> <p>25 selection criteria is typically the dominant</p>	<p>20</p> <p>1 in paragraph 19 of the First Amended Complaint?</p> <p>2 A. Not explicitly. But there were studies</p> <p>3 that were done for different purposes, and some of</p> <p>4 them suggest some various quotes for the studies</p> <p>5 that show that basically the strength of some of</p> <p>6 VGT trade dress and trademarks.</p> <p>7 Q. I guess that's what I'm getting at. So</p> <p>8 you said that the studies that show particular</p> <p>9 trademarks are strong. But are there studies that</p> <p>10 show all of the specific trademarks listed in</p> <p>11 paragraph 19 of the First Amended Complaint are</p> <p>12 strong?</p> <p>13 A. I don't recall any study that shows all</p> <p>14 of the trademarks that we reviewed before, but</p> <p>15 there are -- the studies indicate on a number of</p> <p>16 the responses that they capture some of the trade</p> <p>17 dress, some of the trademarks.</p> <p>18 Q. Well, responses, that only had to do</p> <p>19 with one particular trademark, the Mr. Money Bags</p> <p>20 trademark, correct?</p> <p>21 In other words --</p> <p>22 A. I don't know.</p> <p>23 Q. -- it says nothing about the strength of</p> <p>24 the word mark Polar High Roller, does it?</p> <p>25 A. I don't recall the studies included in</p>

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<p style="text-align: right;">2</p> <p>1 the other thumb studies included some of the other</p> <p>2 trademarks in --</p> <p>3 Q. Oh, I'm sorry.</p> <p>4 A. -- two places. I was referring to the</p> <p>5 other studies.</p> <p>6 Q. I misunderstood. I thought you meant</p> <p>7 your studies.</p> <p>8 A. No. I was referring to the other</p> <p>9 studies conducted by VGT in the course of their</p> <p>10 business.</p> <p>11 Q. Do you recall any particular study</p> <p>12 conducted by VGT that was limited to the strength</p> <p>13 of word marks?</p> <p>14 A. No. As I mentioned before, that all of</p> <p>15 them are other objectives; but when you look at a</p> <p>16 study, there is some evidence in the studies to</p> <p>17 suggest strength of some of the trade dress and</p> <p>18 trademarks.</p> <p>19 Q. And so we're clear, the study you</p> <p>20 performed in this case did not measure the</p> <p>21 strength of VGT's trademarks or trade dress,</p> <p>22 correct?</p> <p>23 A. Correct, it was a confusion study, not a</p> <p>24 secondary meaning study.</p> <p>25 Q. On page 26 of your report, under the</p>	<p style="text-align: right;">23</p> <p>1 Q. Based on near a hundred percent</p> <p>2 awareness of VGT and the 40 to 45 percent market</p> <p>3 share, would you say that it's fair to say that</p> <p>4 VGT is a top-of-mind brand for regular Oklahoma</p> <p>5 casino players?</p> <p>6 MR. ROMAN: Object to the form.</p> <p>7 A. Yes, even though I'm not sure the -- top</p> <p>8 of my mind in term of mention the name, but</p> <p>9 definitely, they'll recognize it when they see it.</p> <p>10 Q. Specifically, which VGT marks do you</p> <p>11 think are strong?</p> <p>12 A. Well, if you look at the -- you have to</p> <p>13 go and look at the -- excuse me, the specific</p> <p>14 studies and what they capture there, so...</p> <p>15 Q. Well, the studies say what the studies</p> <p>16 say.</p> <p>17 A. Right.</p> <p>18 Q. My question is do you have an opinion</p> <p>19 over which particular VGT marks are strong?</p> <p>20 A. My opinion is based only on what the</p> <p>21 study says. I'm not an expert in the area, I just</p> <p>22 rely on those studies.</p> <p>23 Q. Thank you. And how did you decide</p> <p>24 whether to do a Squirt or an Eveready study?</p> <p>25 A. As I said before, because I thought</p>
<p style="text-align: right;">22</p> <p>1 fifth, the next paragraph, it says the first set</p> <p>2 of these studies that I reviewed sought the</p> <p>3 opinion of casino employees, paren, VGT's direct</p> <p>4 customers, closed paren, and showed demand from</p> <p>5 VGT by its direct customers; i.e., casino</p> <p>6 operators as well as VGT's market dominance.</p> <p>7 Now, that is not something that you</p> <p>8 tested for in your studies, correct?</p> <p>9 A. Correct.</p> <p>10 Q. So you're basing your opinion based</p> <p>11 solely on these studies that you cite here,</p> <p>12 correct?</p> <p>13 A. Correct. That's what I said before, all</p> <p>14 of -- all the items under fifth are the other</p> <p>15 consumer studies or customer studies conducted by</p> <p>16 VGT in the conduct of the regular business a few</p> <p>17 years ago.</p> <p>18 Q. And some of the specifics that you point</p> <p>19 out and you rely upon are the statement that</p> <p>20 there's near a hundred percent awareness of VGT --</p> <p>21 of VGT; do you see that?</p> <p>22 A. Yeah.</p> <p>23 Q. And it says that there's a 40 to 45</p> <p>24 percent market share within the state for VGT?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">24</p> <p>1 given the market reality for measuring confusion,</p> <p>2 potential confusion, among machines in a casino,</p> <p>3 Squirt would be the natural and the most preferred</p> <p>4 methodology.</p> <p>5 Q. In addition to the Squirt study that you</p> <p>6 performed, did you perform an Eveready or any</p> <p>7 other type of survey in this case?</p> <p>8 A. No.</p> <p>9 Q. Are there standard practices or</p> <p>10 procedures on how to conduct a Squirt survey?</p> <p>11 A. I'm not sure. I'm not sure. I think</p> <p>12 it's a general -- it's a -- it's a methodology</p> <p>13 which has been done in many areas in consumer</p> <p>14 research and marketing way before its application</p> <p>15 in legal cases and before the adopting of the name</p> <p>16 Squirt.</p> <p>17 Q. Now, I noticed in Appendix C of your</p> <p>18 reply report you replied on -- you relied upon the</p> <p>19 treatise McCarthy On Trademarks and Unfair</p> <p>20 Competition; is that right?</p> <p>21 A. Correct.</p> <p>22 Q. And do you consider Professor McCarthy</p> <p>23 to be a recognized and reliable expert on the</p> <p>24 subject of trademark and trade dress litigation?</p> <p>25 A. Yes.</p>

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<p>33</p> <p>1 A. Yes.</p> <p>2 Q. Who decided on those states?</p> <p>3 A. I did.</p> <p>4 Q. Why?</p> <p>5 A. Initially, we tried to get respondents</p> <p>6 based on data that Research Now had about gambling</p> <p>7 or gaming. And we found that we got very, very</p> <p>8 few responses. We were not able to get any</p> <p>9 respondents.</p> <p>10 And then we primarily checked with</p> <p>11 VGT in term of what is the areas they get most of</p> <p>12 the clients in Oklahoma from, and these were the</p> <p>13 states. And the Research Now then tried to</p> <p>14 experiment getting people from these areas and</p> <p>15 were successful and we focused the search on them.</p> <p>16 Q. All right. So Texas, Kansas, Missouri</p> <p>17 and Arkansas all about Oklahoma, correct? They're</p> <p>18 all next to Oklahoma?</p> <p>19 A. I think including Oklahoma.</p> <p>20 Q. Well, Oklahoma doesn't sit next to</p> <p>21 Oklahoma.</p> <p>22 A. Yeah, yeah.</p> <p>23 Q. They're all adjacent states?</p> <p>24 A. Yeah, adjacent.</p> <p>25 Q. All right.</p>	<p>35</p> <p>1 meeting the criteria that we had for the sample.</p> <p>2 Q. How exactly were the participants in the</p> <p>3 study selected?</p> <p>4 A. There was an invitation to participate</p> <p>5 in the study. Or if you mean earlier research on</p> <p>6 the selected random sample of their people from</p> <p>7 their internet panel and send them invitation to</p> <p>8 participate in the study. And people went through</p> <p>9 the screening, and those who met the screening</p> <p>10 ended up with the 446 responded with the study.</p> <p>11 Q. On page five of Appendix A of your</p> <p>12 report, there's a Q&A about the sample source that</p> <p>13 they use.</p> <p>14 A. Uh-hum.</p> <p>15 Q. Now, it talks about sometimes these</p> <p>16 studies are advertised, sometimes people are</p> <p>17 invited. You're saying here it was invitation</p> <p>18 only?</p> <p>19 A. Correct.</p> <p>20 Q. Okay. And do you know how Research Now</p> <p>21 populates its panel?</p> <p>22 A. Constantly, you know, recruits new</p> <p>23 people to join the panels, many, many sources.</p> <p>24 Q. And are the participants provided any</p> <p>25 incentives for completing the surveys?</p>
<p>34</p> <p>1 A. That's based on my understanding,</p> <p>2 validated by the survey, that this is a feeding</p> <p>3 group for casinos in Oklahoma.</p> <p>4 Q. Okay.</p> <p>5 A. That's the reason they selected people</p> <p>6 from there.</p> <p>7 Q. So it's basically Oklahoma and the</p> <p>8 surrounding states, correct?</p> <p>9 A. Correct.</p> <p>10 Q. All right. Well, there's two other</p> <p>11 states that are surrounding Oklahoma, that would</p> <p>12 be Colorado and New Mexico on the western edge.</p> <p>13 Why were they excluded from the study?</p> <p>14 A. They were not suggested as part of the</p> <p>15 feeding states.</p> <p>16 Q. Suggested by who?</p> <p>17 A. By VGT.</p> <p>18 Q. And why did you choose to exclude</p> <p>19 residence of any other state whether or not</p> <p>20 they've played or intended to play casinos in</p> <p>21 Oklahoma?</p> <p>22 A. We just couldn't get them in because of</p> <p>23 any reasonable time or economic way. The</p> <p>24 percentage, we tried a natural sample originally,</p> <p>25 and we got almost no responses naturally for</p>	<p>36</p> <p>1 A. Yes.</p> <p>2 Q. And if the participant is excluded from</p> <p>3 the survey, for example, if they never gambled in</p> <p>4 Oklahoma or don't intend to game in Oklahoma, does</p> <p>5 he or she still get the incentive?</p> <p>6 A. I don't know because they are recruiting</p> <p>7 for many organizations. There are different</p> <p>8 organizations with different arrangements with</p> <p>9 them. So some of them are like frequent flier</p> <p>10 miles they're getting and some don't. So I don't</p> <p>11 know if some will get if they're not responding.</p> <p>12 I know they do get a reward if they do respond.</p> <p>13 Q. Have you used Research Now before?</p> <p>14 A. Yes.</p> <p>15 Q. You often use them?</p> <p>16 A. Yes, whenever there is an internet panel</p> <p>17 requirement, I use them.</p> <p>18 Q. Have you ever done an analysis or study</p> <p>19 as to whether or not their panels are reflective</p> <p>20 of the demographics of the general population?</p> <p>21 A. They are -- they and most other panels</p> <p>22 will claim that they have a matched demographic.</p> <p>23 I don't think the demographic is</p> <p>24 the challenge. The challenge is the nature of</p> <p>25 respondent. And in early years of internet panel,</p>

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<p>65</p> <p>1 Q. -- of the stimuli you actually used, the</p> <p>2 only two that have --</p> <p>3 A. Yeah.</p> <p>4 Q. -- the word "money" in the title are</p> <p>5 Mr. Money Bags and New Money, correct?</p> <p>6 A. I think so. I cannot see the signs on</p> <p>7 the other three here.</p> <p>8 Q. Well, one is Imperial Wealth, the other</p> <p>9 one has gold in the name, and the third -- the</p> <p>10 final has gold in the name.</p> <p>11 A. And a sign of dollar --</p> <p>12 Q. Right.</p> <p>13 A. -- dollar sign, which is money.</p> <p>14 Q. Right. But it doesn't have the word</p> <p>15 "money"?</p> <p>16 A. Correct.</p> <p>17 Q. And you placed New Money and Mr. Money</p> <p>18 Bags right next to each other in the survey,</p> <p>19 right?</p> <p>20 A. They were rotated. But, yeah, some of</p> <p>21 them, absolutely, they were together, one extra</p> <p>22 dollar.</p> <p>23 Q. In fact, on page six of your report, you</p> <p>24 state that to avoid potential bias by the same</p> <p>25 placement of machines next to each other, I</p>	<p>67</p> <p>1 the other one is random. Sometime it's easier for</p> <p>2 the fields to work with established rotations.</p> <p>3 Q. All right. So to visualize, let's turn</p> <p>4 to page seven and look at this array. Each of the</p> <p>5 games has a number associated with it, correct?</p> <p>6 And so K is VGT, M is Castle Hill, P is Konami, S</p> <p>7 is Scientific Games and T is IGT, correct?</p> <p>8 A. Correct.</p> <p>9 Q. And I understand that in the actual game</p> <p>10 the manufacturer names are not there?</p> <p>11 A. Correct.</p> <p>12 Q. That's just for identification purposes?</p> <p>13 A. Correct.</p> <p>14 Q. So the world of possible viewings, am I</p> <p>15 correct is what we have here, we have KMPST?</p> <p>16 A. Uh-hum.</p> <p>17 Q. Then we have TKMPS, STKMP, PSTKM and</p> <p>18 MPSTK, right, those are the five possibilities?</p> <p>19 A. Correct.</p> <p>20 Q. And in those, Mr. Money Bags will always</p> <p>21 Mr. Money Bags K will always be next to Mr. Money</p> <p>22 Bags M in all possible permutations except for</p> <p>23 MPSTK New Money, I'm sorry.</p> <p>24 MR. ROMAN: It's confusing, I know.</p> <p>25 Q. Move to strike.</p>
<p>66</p> <p>1 directed that the lineup for each be rotated. And</p> <p>2 that's what --</p> <p>3 A. Correct.</p> <p>4 Q. -- you were just referring to?</p> <p>5 A. Correct.</p> <p>6 Q. And what do you mean by rotated?</p> <p>7 A. Well, so the -- the machines will appear</p> <p>8 on the screen in different orders. It won't</p> <p>9 always be the same machine on the left side and,</p> <p>10 you know, the other machines in the same order.</p> <p>11 So you basically rotate the order of the machines.</p> <p>12 So people see different machines in the most left,</p> <p>13 different machines next to it, different machines</p> <p>14 that they liked and so on.</p> <p>15 Q. The next paragraph on that page, you say</p> <p>16 each respondent show one of the five rotations; is</p> <p>17 that correct?</p> <p>18 A. Correct.</p> <p>19 Q. So this wasn't a random order shown to</p> <p>20 the respondents, it was a rotation of one</p> <p>21 particular array, correct?</p> <p>22 A. Correct.</p> <p>23 Q. Why didn't you do it randomly?</p> <p>24 A. These are the two, you know, accepted</p> <p>25 approach. One is you create certain rotations,</p>	<p>68</p> <p>1 MR. ROMAN: What page are you on?</p> <p>2 Q. I'm just looking at the stimuli on page</p> <p>3 seven.</p> <p>4 MR. ROMAN: Okay. I thought you</p> <p>5 were reading off of something. Oh, you're</p> <p>6 reading off your notes.</p> <p>7 Q. I'm reading off my notes.</p> <p>8 MR. ROMAN: Okay. Sorry.</p> <p>9 Q. You know, maybe we ought -- would it be</p> <p>10 easier if I wrote that down?</p> <p>11 A. No, that's fine.</p> <p>12 Q. You followed it?</p> <p>13 A. I followed it.</p> <p>14 Q. All right. So there's only one</p> <p>15 permutation of the five possibilities where</p> <p>16 Mr. Money Bags is not shown directly next to New</p> <p>17 Money, correct?</p> <p>18 A. Yeah.</p> <p>19 Q. So that would be 80 percent of the time,</p> <p>20 correct?</p> <p>21 A. Sounds like a reasonable calculation.</p> <p>22 Q. I'm a lawyer, not a mathematician, but</p> <p>23 just checking. You have the Stanford Ph.D.</p> <p>24 So 80 percent of the time</p> <p>25 respondents compared the drawings of Mr. Money</p>

<p>69</p> <p>1 Bags and New Money directly next to each other, 2 which was the bias you were seeking to avoid by 3 rotating the pictures in the first place, right? 4 A. Well, there are two types of potential 5 bias. One potential bias is the order effect in 6 which case how many times K would appear first, 7 how many times K would appear second, how many 8 times K would appear third, how many times K would 9 appear fourth, how many times K would appear fifth 10 and so on. So the rotation that we have, they're 11 control for this. So, basically, each one of the 12 five machines appeared equal amount of times in 13 each one of the five locations. 14 You're right that in the specific 15 case there is a situation where K and M appeared 16 most of the time together, but so have been other 17 combination. So it has been also M and P and P 18 and S and T and T and K. 19 So a simple way to test is there a 20 bias or not is to ask the question is there any 21 other pair that appears together one after the 22 other that basically people selected them just 23 because they appeared next to each other. 24 And if you look at the data, then 25 it suggests that there's no other pair that </p>	<p>7</p> <p>1 what table 39 is. 2 A. It's a table that shows the responses 3 for -- if you go back to my report -- 4 Q. Well, let me ask this, is it fair to say 5 that this is a table showing the actual responses 6 to each of your questions based on the order of 7 the viewed images? 8 A. Not to each of the questions, no. What 9 it is -- it shows -- that's the reason why I 10 wanted to go to the -- to the actual report. If 11 you look at figure 3A, which is page 22nd of the 12 report, these are the columns. So the column -- 13 Q. Page 20, I'm sorry? 14 A. Page 22 in my report. 15 Q. Okay. 16 A. Figure 3A. 17 Q. Sure. 18 A. So this is the categorization of the 19 open-ended responses. This is for the reasons for 20 perceived similarity of the different stimuli. 21 So the columns is one -- first one, 22 you have a total for the whole sample, and then 23 you have tests, which would be basically the 24 hundred -- the 289 people responded test. And 25 then you have K and M only, which will be 183 </p>
<p>70</p> <p>1 basically appears even close to these two, even 2 though if your hypothesis is that it's the 3 location that makes the difference here, you're 4 expected to have equal number of people selecting 5 M and P or P and S or S and T or T and K and the 6 other kind of addressing items. 7 So based on this, I feel that, 8 yeah, potentially this could have been bias, but 9 once you check it against the data, we chose that 10 there is no bias here. 11 Q. Okay. Let's check it against the data. 12 Can you turn to table 39 of your report. 13 MR. ROMAN: Henry, when you get to 14 a stopping point. 15 Q. Sure, right after we finish this. 16 MR. ROMAN: Thank you. 17 Q. Table 39, if you're looking 18 electronically, it's page 232 of the PDF. 19 A. It's computer tabulation. 20 MS. FLAX: I think it's 128. 21 Q. Yes, 128 of the tables. 22 MR. ROMAN: Is it table 22? 23 Q. Table 39. 24 MR. ROMAN: Table 39. 25 Q. Okay. If you look at -- can you tell us </p>	<p>72</p> <p>1 people, and then you have basically the others. 2 And control will be the 77 people. So if you look 3 at -- basically, these are the columns. 4 Q. I understand. 5 A. Then it shows you basically how many 6 people received each one of those patterns. 7 Q. Okay. Well, let's focus on the K and M 8 only, column C on table 39. That's the 183, which 9 you said on figure 3A appears, that's the first 10 column, the test, right? 11 A. Right. 12 Q. All right. Those are people that in 13 that -- in your survey only identified Castle 14 Hill's New Money with VGT's Mr. Money Bags? 15 A. Correct. 16 Q. No others, correct? 17 A. Correct. 18 Q. Okay. So if we look on table 39, right? 19 A. Yeah. 20 Q. If you look at for that column, column 21 C, right, the first one is KMPST, correct; do you 22 see that? 23 A. Right. 24 Q. And 38 or 20.8 percent respondents did 25 that, correct? </p>

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<p>73</p> <p>1 A. Right.</p> <p>2 Q. And so MPSTK in that order for column C,</p> <p>3 K and M only, is 15.8 percent, correct?</p> <p>4 A. Right.</p> <p>5 Q. And the next one is PSTKM, 37, which is</p> <p>6 20.2 percent, right?</p> <p>7 A. Yes.</p> <p>8 Q. The next one STKMP, it's 41, which is</p> <p>9 22.4 percent?</p> <p>10 A. Right.</p> <p>11 Q. And the last one TKMPS --</p> <p>12 A. Right.</p> <p>13 Q. -- is 38 or 20.8 percent?</p> <p>14 A. Right.</p> <p>15 Q. Like I used to do with my kids, we can</p> <p>16 say one of these things is not like the other,</p> <p>17 right?</p> <p>18 They're all approximately 20 to</p> <p>19 22 percent, except for MPSTK, which is</p> <p>20 15.8 percent, correct?</p> <p>21 A. Well, but basically, the difference is</p> <p>22 not that significant. Basically, all of them,</p> <p>23 it's close between 16 and 22, and --</p> <p>24 Q. Well, all of them are between 20 and 22</p> <p>25 except for that particular one which is 15.8,</p>	<p>75</p> <p>1 of gap here, so on table 39, would you agree or</p> <p>2 not agree that there is an approximately</p> <p>3 25 percent difference in the survey results</p> <p>4 finding confusion between Mr. Money Bags and New</p> <p>5 Money between the one where the individual</p> <p>6 machines are not next to each other and the ones</p> <p>7 where they are?</p> <p>8 MR. ROMAN: Object to the form.</p> <p>9 A. I think that by stating it as a</p> <p>10 percentage difference between the two you are</p> <p>11 exaggerating the difference, because, basically,</p> <p>12 if you look at the entire definition between 15.8</p> <p>13 and 22 -- 22.4, it's within the range. It's</p> <p>14 hardly significant, so I --</p> <p>15 Q. It's a 25 percent difference, though,</p> <p>16 isn't it?</p> <p>17 MR. ROMAN: Object to the form.</p> <p>18 A. But look at -- look at this in the</p> <p>19 context. Look in the context of the --</p> <p>20 Q. I'm asking you specifically on the data</p> <p>21 there, that's yes or no, is that a 25 percent or</p> <p>22 more difference?</p> <p>23 A. I didn't calculate. I'll trust your</p> <p>24 calculation.</p> <p>25 Q. Thank you.</p>
<p>74</p> <p>1 correct?</p> <p>2 A. I doubt -- this is insignificant. It's</p> <p>3 not a big difference.</p> <p>4 Q. Okay. Well, it's a 20 percent</p> <p>5 difference, isn't it?</p> <p>6 A. Yeah. But the better test of this if</p> <p>7 there is bias or not is to ask how many of the</p> <p>8 other pairs that appear together, how many of</p> <p>9 them -- not in this data, but how many people</p> <p>10 selected M and P, how many people selected P and</p> <p>11 S, how many people selected S and T, all the ones</p> <p>12 which are close to each other.</p> <p>13 Because you also have a situation</p> <p>14 that M and P appears basically in most of them</p> <p>15 together. And if you look at this, if you look at</p> <p>16 table two of my report, you'll find out that</p> <p>17 basically in terms of the pairs there is no one</p> <p>18 that comes even close to the level of repairs that</p> <p>19 you have -- this is figure 2A on page 20.</p> <p>20 You know, you have basically</p> <p>21 56.6 percent selected K and M. The closest to it</p> <p>22 is S and T was 21 percent and everything else is</p> <p>23 below it. Even if you take all the other ones</p> <p>24 together combined, it's less than 56.6 percent.</p> <p>25 Q. All right. Just to close the little bit</p>	<p>76</p> <p>1 A. But I'm saying, again, in this context,</p> <p>2 this is the wrong measure of is there a bias or</p> <p>3 not. The correct measure is there a bias or not</p> <p>4 is to look at the other pairs that appear close</p> <p>5 together and ask the question do you get similar</p> <p>6 type of results.</p> <p>7 And if you want to, if you find out</p> <p>8 that the other -- look at the average of all the</p> <p>9 other pairs that appear together, calculate this a</p> <p>10 control, and deduct from the tests we have, the</p> <p>11 results we have, this number, and you'll find out</p> <p>12 that, basically, you're not changing at all the</p> <p>13 results we got because it's a tiny little number</p> <p>14 compared to the huge number of confusion that we</p> <p>15 have, up to 56.6 percent confusion.</p> <p>16 MR. PLATT: Thank you. Take a</p> <p>17 break.</p> <p>18 THE VIDEOGRAPHER: Off the record</p> <p>19 at 12:14.</p> <p>20 (Recess.)</p> <p>21 THE VIDEOGRAPHER: Back on the</p> <p>22 record at 12:48.</p> <p>23 BY MR. PLATT:</p> <p>24 Q. Good afternoon, Dr. Wind.</p> <p>25 A. Good afternoon. Thanks for lunch.</p>

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<p>89</p> <p>1 to see which ones are most like the other, right?</p> <p>2 A. Yeah, in general term.</p> <p>3 Q. In a nutshell, right, with a follow-up</p> <p>4 question as to why?</p> <p>5 A. Right.</p> <p>6 Q. Okay. Does that study, that survey,</p> <p>7 determine whether or not VGT actually has an</p> <p>8 established trade dress?</p> <p>9 A. By itself, it's not a trade dress study.</p> <p>10 It's primarily the magnitude of results would</p> <p>11 suggest that the reasonable inference is they do</p> <p>12 have a trade dress.</p> <p>13 Q. Well, you say the magnitude of the</p> <p>14 study. The study you said showed a high</p> <p>15 correlation of people finding similarities based</p> <p>16 on your questions between the New Money and the</p> <p>17 Castle Hill game, correct?</p> <p>18 A. Yes.</p> <p>19 Q. I mean, the New Money Castle Hill game</p> <p>20 and the VGT Mr. Money Bags, correct?</p> <p>21 A. Correct.</p> <p>22 Q. All right. But that doesn't establish</p> <p>23 in any way whether or not VGT actually has a trade</p> <p>24 dress, it just means that these two things look</p> <p>25 alike?</p>	<p>9</p> <p>1 reason we have the similarity is because people</p> <p>2 perceived, you know, similarity on these specific</p> <p>3 dimensions, and this means that these dimensions</p> <p>4 are real for the consumers. So that's where the</p> <p>5 inference comes.</p> <p>6 Q. My second point of confusion, and I know</p> <p>7 you've answered this before, but I'd like to hear</p> <p>8 it again, why did you pick the most popular game,</p> <p>9 the most common in the most common configuration</p> <p>10 to compare?</p> <p>11 MR. ROMAN: I have to object.</p> <p>12 Asked and answered.</p> <p>13 Q. It has been asked and answered. I don't</p> <p>14 think I really understand the question, so -- I</p> <p>15 mean the answer.</p> <p>16 A. The answer is simple, what other</p> <p>17 criteria could you apply to select a machine. One</p> <p>18 is random, and I did not feel comfortable going</p> <p>19 random because you can come up with a totally</p> <p>20 atypical machine.</p> <p>21 And second is basically a criteria</p> <p>22 such as, you know, what is the most popular</p> <p>23 machine, which is a common criteria used in</p> <p>24 marketing.</p> <p>25 Q. But VGT is suing Castle Hill over 20</p>
<p>90</p> <p>1 A. Well, but, basically, you have two</p> <p>2 things here, you have, one, is they look alike in</p> <p>3 term of the overall looks. Obviously, consumer</p> <p>4 judgment is based on the overall look and feel of</p> <p>5 the machines.</p> <p>6 Q. Well, not feel, they didn't touch,</p> <p>7 right?</p> <p>8 A. The look. And the second fact is look</p> <p>9 at the open-ended responses, look at what people</p> <p>10 told us in term of why did they group them</p> <p>11 together, and a lot of the items that they grouped</p> <p>12 them together is because of design elements.</p> <p>13 Q. Okay. Yeah, so they said that they</p> <p>14 thought design elements were similar. But my</p> <p>15 point is that doesn't establish that there is a</p> <p>16 distinctive trade dress that VGT has on its</p> <p>17 product line, does it?</p> <p>18 A. Well, that's what I said, by inference,</p> <p>19 given the magnitude of the similarity, perceived</p> <p>20 similarity, you can infer that VGT does have the</p> <p>21 trade dress.</p> <p>22 Q. Why do you make that -- how can you make</p> <p>23 that inference?</p> <p>24 A. Because if it would not have it, we</p> <p>25 would not have this level of similarity. The only</p>	<p>92</p> <p>1 different titles beyond, roughly, beyond Mr. Money</p> <p>2 Bags.</p> <p>3 A. Uh-hum.</p> <p>4 Q. But you didn't think it was important to</p> <p>5 see if any of the respondents had any level of</p> <p>6 confusion at all between those other games?</p> <p>7 A. Well, as I said before, I don't think</p> <p>8 it's very realistic given the very difficult</p> <p>9 situation of getting stimuli. We had a very hard</p> <p>10 time getting even these stimuli.</p> <p>11 It's very difficult to get</p> <p>12 respondent -- that respondent, the company</p> <p>13 respondent we had to go through to try to get the</p> <p>14 400 respondent we got here. So it would not have</p> <p>15 been realistic in term of feasibility, in term of</p> <p>16 time, in term of cost to try to do multiple</p> <p>17 studies on multiple stimuli.</p> <p>18 If it was an easier situation and</p> <p>19 you have the right stimuli, yeah, you could</p> <p>20 definitely -- and easy to get people, yeah, you</p> <p>21 can then select randomly from the set, let's say,</p> <p>22 three or four of them and run three or four tests.</p> <p>23 But we didn't have the luxury of ability to do it.</p> <p>24 So we had to narrow it down to, okay, which</p> <p>25 machine do we select. So I thought the criteria</p>

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<p>93</p> <p>1 for selecting a machine makes a lot of sense. 2 That's the reason I did it. 3 And then the second question is, 4 once you have the study, can you project it to the 5 rest of the line. So if you look at the study and 6 you look at the second part of my report, which is 7 other supporting data that suggests confusion out 8 of the five elements, I'm suggesting in the second 9 part of my report I feel confident, unless shown 10 other evidence to the contrary, that the results 11 can be projected to the rest of the line. 12 Q. In the array you used on page seven in 13 the survey, you chose to use a VGT game with the 14 pseudo pay table in the rounded top instead of the 15 belly glass as it is in several of their other 16 games; is that correct? 17 A. Correct. 18 Q. Have you seen pictures of VGT games with 19 the pseudo pay table in a place other than the 20 rounded top? 21 A. Yes. 22 Q. And in the specific pseudo pay tables 23 that you used, you chose to use a VGT game and a 24 Castle Hill game that has the same pseudo pay 25 table and the rounded top instead of any of the</p>	<p>95</p> <p>1 Mr. Money Bags is different than the pay table for 2 Polar High Roller, the numbers are different? 3 A. Yes. 4 Q. And do you see how on the next page the 5 Gems and Jewels table is different from the other 6 two you just looked at? 7 A. Yes. 8 Q. And do you see how Castle Hill has 9 different pay tables as well? 10 A. Yes. 11 Q. So when you put two machines next to 12 each other for comparison in your array, you chose 13 the ones that just happened to have the same pay 14 tables, correct? 15 A. Well, they are part of the array. They 16 are part of the available options. I did not 17 invent these. 18 Q. I understand. But you could have chosen 19 a game with any of these other pay tables on it, 20 but you chose the one that happened to be the 21 same, right? 22 A. Again, I asked primarily to give me the 23 one which is the best-selling unit and -- and -- 24 and product. 25 Q. Okay.</p>
<p>94</p> <p>1 other pseudo pay tables used by the parties in the 2 various games, correct? 3 A. Yeah, this is the one that was available 4 for me in terms of pictures for me to work with. 5 Q. The games? 6 A. The games. 7 Q. So even though VGT has games with many 8 different pay tables, you chose the one that was 9 the same as the Castle Hill game you chose to 10 display even though Castle Hill has different pay 11 tables, also? 12 A. But Castle Hill elected to basically to 13 copy VGT. So they are the ones who selected this 14 type of -- it's not like I invented this -- this 15 machine. It's Castle Hill that designed this 16 machine to copy VGT. And we tried to find out to 17 what extent this copying is perceived by consumers 18 as basically similar. 19 Q. All right. If you could turn to Exhibit 20 6, to the amended complaint. Exhibit 6 is a chart 21 purporting to show VGT's various pay tables and 22 various pay tables from Castle Hill; do you see 23 that? 24 A. Yes. 25 Q. Do you see how the pay tables for</p>	<p>96</p> <p>1 A. And this is the one that I got. 2 Q. And you -- 3 A. The matching to this was basically the 4 matching -- if you go to the complaint, the 5 original matching that was in the previous exhibit 6 we saw, we tried primarily to compare the Money 7 Bag with the New Money. 8 Q. Okay. 9 A. I got the best pictures they could give 10 me on these two. 11 Q. All right. So you picked a Castle Hill 12 game and a VGT game that had the same pseudo pay 13 table, correct? 14 A. Yes. 15 Q. And what about the pseudo pay tables on 16 the Konami, Scientific Games and IGT machines, did 17 you make an attempt to match those as well? 18 A. I asked for -- basically, the units -- 19 once we selected those that existed in the same 20 casino, I asked to get the one that had similar 21 characteristics to the VGT and CHG, and I don't -- 22 I did not select explicitly specific pay tables 23 for them. 24 Q. So you deliberately chose to use two 25 machines that had the same pay table, but you made</p>

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54 (213 to 216)

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<p>2 3</p> <p>1 A. As much time as they wanted.</p> <p>2 Q. Wasn't that one of the things that</p> <p>3 eliminated people from the study?</p> <p>4 A. Only if someone did it very, very fast.</p> <p>5 I think the rule is 30 percent faster than the</p> <p>6 medium then they are excluded from the study</p> <p>7 because they are basically the people are just</p> <p>8 trying to complete the questionnaire. They're not</p> <p>9 paying any attention. There's no way they could</p> <p>10 have paid attention for the stimuli. So we</p> <p>11 actually we protected against people speeding up</p> <p>12 sort of the process.</p> <p>13 Q. What about people taking too long, were</p> <p>14 they excluded?</p> <p>15 A. No. We just basically focused on the</p> <p>16 bottom line, on the speed.</p> <p>17 Q. All right. What do you mean by they</p> <p>18 were given the option of enlarging the images?</p> <p>19 A. Well, it was a screen and they could</p> <p>20 have actually enlarged the image to see it larger.</p> <p>21 Q. How did they do that?</p> <p>22 A. By moving their mouse on this.</p> <p>23 Q. And they would click on it?</p> <p>24 Okay. And was this a zoom feature?</p> <p>25 A. Yes.</p>	<p>2 5</p> <p>1 adjustment of enlarging it.</p> <p>2 Q. All right.</p> <p>3 A. I did not do it. But my understanding</p> <p>4 is that the technology that Research Now allows</p> <p>5 you to select specific parts of the picture that</p> <p>6 you want to do it.</p> <p>7 Q. Well, I would agree with you that</p> <p>8 technology allows it. What I disagree with you is</p> <p>9 that your survey allows you to do that, but we'll</p> <p>10 get back to that later.</p> <p>11 On page nine of your report, you</p> <p>12 state that -- let me see where it is -- the main</p> <p>13 question you state, the main questionnaire</p> <p>14 states -- and these are what the actual players</p> <p>15 are told, right?</p> <p>16 A. Right.</p> <p>17 Q. It says you can zoom in to see any</p> <p>18 element of the machine better. That's what you</p> <p>19 were just saying, right?</p> <p>20 A. Right.</p> <p>21 Q. And it's your testimony that's actually</p> <p>22 true?</p> <p>23 A. My understanding is that the -- the</p> <p>24 questionnaire as implemented allowed them to do</p> <p>25 it.</p>
<p>2 4</p> <p>1 Q. What do you mean by a zoom feature?</p> <p>2 A. That you can basically enlarge a section</p> <p>3 to see it larger.</p> <p>4 Q. Okay.</p> <p>5 A. It gets it back to normal.</p> <p>6 Q. So if you clicked on it, you got a</p> <p>7 bigger picture?</p> <p>8 A. Correct.</p> <p>9 Q. It wasn't like you can -- I don't know</p> <p>10 if you do online shopping. If you want to look at</p> <p>11 something when you're online shopping, you can</p> <p>12 actually zoom into fine detail of specific parts</p> <p>13 of a picture. It wasn't that, you just get a</p> <p>14 slightly bigger picture, correct?</p> <p>15 A. But you could focus on a specific part</p> <p>16 of the picture.</p> <p>17 Q. I'm sorry?</p> <p>18 A. You could focus on part -- parts of the</p> <p>19 picture.</p> <p>20 Q. Have you taken this survey, sir?</p> <p>21 A. I did.</p> <p>22 Q. And it's your testimony that you can</p> <p>23 zoom in and focus on a specific part of this</p> <p>24 picture?</p> <p>25 A. I did not do it. I did basically a full</p>	<p>2 6</p> <p>1 Q. Did you review the verbatim responses in</p> <p>2 this case?</p> <p>3 A. Yes.</p> <p>4 Q. And part of your survey, you asked for</p> <p>5 feedback regarding the survey --</p> <p>6 A. Right.</p> <p>7 Q. -- afterwards?</p> <p>8 Turn to table 38, on page 126 of</p> <p>9 the tables.</p> <p>10 MR. ROMAN: What page?</p> <p>11 Q. 126?</p> <p>12 A. The tables. Computer tabulation.</p> <p>13 Q. So it's table 38.</p> <p>14 A. Correct.</p> <p>15 Q. The question on this table that was</p> <p>16 asked do you have any feedback about this survey</p> <p>17 and your experience taking it.</p> <p>18 A. This was the last question of the</p> <p>19 survey.</p> <p>20 Q. Sure. And one of the things people said</p> <p>21 was need more detail, zoom in on pictures to</p> <p>22 answer, correct?</p> <p>23 A. Yeah, there were seven people that</p> <p>24 mentioned it.</p> <p>25 Q. So that was an issue raised?</p>

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<p>2 7</p> <p>1 A. By seven people.</p> <p>2 Q. By seven people. What about in the</p> <p>3 verbatim responses?</p> <p>4 A. What is the question about it, what</p> <p>5 about it?</p> <p>6 Q. Did you review the verbatim responses of</p> <p>7 those seven people to see if they had additional</p> <p>8 concerns about the zoom feature?</p> <p>9 A. No, I did not follow on this specific</p> <p>10 seven people. I went over all -- I went over all</p> <p>11 the verbatims.</p> <p>12 Q. Okay. And did you notice other</p> <p>13 people -- that people were mentioning the problem</p> <p>14 with the zoom feature within the other verbatim</p> <p>15 responses?</p> <p>16 A. I don't recall any.</p> <p>17 Q. Let's look at a couple. If you can turn</p> <p>18 to page 21 of the verbatim responses, respondent</p> <p>19 2351.</p> <p>20 A. What's the number?</p> <p>21 Q. 2351, page 21.</p> <p>22 A. Page 21?</p> <p>23 Q. Yes.</p> <p>24 A. I have page 20.</p> <p>25 Q. Specifically, response D3, very</p>	<p>2 9</p> <p>1 yes, the five looked basically the same</p> <p>2 resolution. I think when you enlarged them, I</p> <p>3 think some of them may have been a better</p> <p>4 resolution.</p> <p>5 Q. And which ones had the best resolution?</p> <p>6 A. I don't recall at this stage.</p> <p>7 Q. Well, it was the VGT game and Castle</p> <p>8 Hill game for sure, right?</p> <p>9 A. I just don't recall, you know, which of</p> <p>10 the five had it. I recall that there was a --</p> <p>11 basically a comment on this, but it was only when</p> <p>12 you zoomed that some of the resolution improved.</p> <p>13 Q. Look at page seven of your reply report</p> <p>14 and tell me if that refreshes your recollection.</p> <p>15 Specifically, the paragraph under</p> <p>16 section D, which is the images used in the survey</p> <p>17 were the best available and provided sufficient</p> <p>18 detail, you say, first, although Mr. Berger claims</p> <p>19 that the quality of the images of the VGT and CHG</p> <p>20 EGMs are higher definition than the images of the</p> <p>21 other stimuli EGMs when viewed without zooming,</p> <p>22 all five images have similar resolution.</p> <p>23 Let's look at the pictures. All</p> <p>24 right. So we have on page seven. You have your</p> <p>25 five pictures. You want to look at the actual</p>
<p>2 8</p> <p>1 frustrated as zoom didn't get me enough details to</p> <p>2 tell you what you needed to know.</p> <p>3 A. So this would be one of the seven</p> <p>4 people.</p> <p>5 Q. Presumably.</p> <p>6 A. It has to be because otherwise it would</p> <p>7 have been listed in -- in part of the response in</p> <p>8 the previous table we looked at.</p> <p>9 Q. All right. And then again for</p> <p>10 respondent 5219, page 57.</p> <p>11 A. 5219?</p> <p>12 Q. Uh-hum.</p> <p>13 A. What page?</p> <p>14 Q. 57.</p> <p>15 A. So this person says you could make the</p> <p>16 zoom even more refined or more zoomed in.</p> <p>17 Q. So they weren't able to zoom in on the</p> <p>18 features they wanted like you said?</p> <p>19 A. No, we don't know it. All we know that</p> <p>20 it says or she says you could make the zoom even</p> <p>21 more refined or more zoomed in. It doesn't say</p> <p>22 anything that they could not do it.</p> <p>23 Q. Were all the machines that you showed</p> <p>24 shown in the same resolution?</p> <p>25 A. When they looked at them at the five,</p>	<p>220</p> <p>1 survey pictures that you have, we can do those.</p> <p>2 So without zooming, can you read</p> <p>3 the names of the games?</p> <p>4 A. The copy you gave me of the</p> <p>5 questionnaire is black and white. This is not the</p> <p>6 way the respondents saw them. They saw them on</p> <p>7 the screen in color, and they were asked whether</p> <p>8 they can see it in color.</p> <p>9 Q. I apologize, I did ask for color copies</p> <p>10 and I'm sort of surprised you didn't get one.</p> <p>11 So why don't we use this.</p> <p>12 A. So what is the question?</p> <p>13 Q. Can you read the names of the games?</p> <p>14 A. Not -- not on paper. I was able to read</p> <p>15 them easily when I -- when I completed the</p> <p>16 questionnaire on the screen.</p> <p>17 Q. Let me take that back. We'll look at</p> <p>18 the actual online one in a little while.</p> <p>19 You said they have the same</p> <p>20 resolution when not enlarged, correct?</p> <p>21 A. Correct.</p> <p>22 Q. And then you stated in your report on</p> <p>23 page seven that even after zooming, the image of</p> <p>24 the Scientific Games EGM has similar resolution to</p> <p>25 the images of the VGT and CHG EGMs, correct?</p>

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<p>245</p> <p>1 correct. You cannot go more than once.</p> <p>2 Q. Okay. So, again, we're back to we</p> <p>3 qualified. On the next screen, we'll show you</p> <p>4 five gaming machines that you may see in an</p> <p>5 Oklahoma casino.</p> <p>6 A. Right.</p> <p>7 Q. And the order that came up is the KMPST.</p> <p>8 That's the same order that's in the report,</p> <p>9 correct?</p> <p>10 A. Correct.</p> <p>11 Q. All right. So let try the zoom feature.</p> <p>12 How do you zoom?</p> <p>13 So you've clicked on it and it's an</p> <p>14 enlarged picture, right?</p> <p>15 A. An enlarged picture, right.</p> <p>16 Q. Can you zoom in on that to show any of</p> <p>17 the detail?</p> <p>18 A. Apparently, not.</p> <p>19 Q. So you have an enlarged picture, and in</p> <p>20 this picture, you can see the name of the game and</p> <p>21 the numbers on the pay tables; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. And you can see that this is a bingo</p> <p>24 card?</p> <p>25 A. Yes.</p>	<p>247</p> <p>1 Q. No. Actually, what I want to do is</p> <p>2 start over and I want to get a different array.</p> <p>3 A. Okay.</p> <p>4 Q. So let's see if we can do that. Let me</p> <p>5 get the numbers for this one to start over.</p> <p>6 Okay. So do you want to do it</p> <p>7 or --</p> <p>8 A. Go ahead, you can do it.</p> <p>9 Q. Sure. I have read and understand,</p> <p>10 right?</p> <p>11 A. Yeah. There is no space between them.</p> <p>12 Q. I will be female this time just for fun,</p> <p>13 and then I'll be 29 because that's a great age.</p> <p>14 A. Sounds good.</p> <p>15 Q. And my zip code, 20006, this will work,</p> <p>16 and I'll be in education just like you.</p> <p>17 A. That's good.</p> <p>18 Q. I've already completed it. I'll let you</p> <p>19 in any way for testing.</p> <p>20 Okay. Have you visited the casino.</p> <p>21 Oklahoma. Slot or bingo machines. We've</p> <p>22 qualified. This is the array where they're</p> <p>23 separate, correct?</p> <p>24 A. Correct.</p> <p>25 Q. This is the one possibility where</p>
<p>246</p> <p>1 Q. Okay. Let's look at some of the others.</p> <p>2 You click on, whatever you like to</p> <p>3 do, and you're trying to move them. But to</p> <p>4 enlarge them, you need to click?</p> <p>5 MS. FLAX: Double click.</p> <p>6 A. Double click.</p> <p>7 Q. Okay. All right. So what's the name of</p> <p>8 this game?</p> <p>9 A. This is the Gold Winners. This is</p> <p>10 gold -- Gold Winners.</p> <p>11 Q. Okay. Do you recall whose machine that</p> <p>12 is?</p> <p>13 A. No.</p> <p>14 Q. Okay. And you can enlarge P?</p> <p>15 A. Yeah.</p> <p>16 Q. Okay. Again, you can't zoom in on it</p> <p>17 any more than that, correct?</p> <p>18 A. I was mistaken before. Because I just</p> <p>19 enlarged it, and had a discussion with the field</p> <p>20 to try to allow zooming on specific sections, and</p> <p>21 I forgot that eventually they said they could not</p> <p>22 do it on this version, it's only enlarging. So I</p> <p>23 misspoke way, way before.</p> <p>24 Q. Okay.</p> <p>25 A. You want to continue?</p>	<p>248</p> <p>1 they're not next to each other?</p> <p>2 A. Correct.</p> <p>3 Q. All right. Start over.</p> <p>4 A. Keep in mind that this is not what</p> <p>5 consumers see because you're in test mode. The</p> <p>6 consumers see actually without all these errors</p> <p>7 that you already responded to this. So you're</p> <p>8 basically on the test version.</p> <p>9 Q. Got it.</p> <p>10 A. And not the real version the consumers</p> <p>11 saw.</p> <p>12 Q. I'll be male this time.</p> <p>13 This one is STKMP, correct?</p> <p>14 A. Yeah.</p> <p>15 Q. Okay. I'm afraid I'm going to have to</p> <p>16 do this one more time to get to the array I'm</p> <p>17 looking for.</p> <p>18 Oh, it's my age, sorry.</p> <p>19 A. This will be a world record.</p> <p>20 Q. Yeah.</p> <p>21 A. Two-thousand-year old person.</p> <p>22 Q. Education. I hope it works this time.</p> <p>23 Okay. The array that we have now</p> <p>24 is in the order of TKMPS, correct?</p> <p>25 A. Yes.</p>

Transcript of Dr. Yoram (Jerry) Wind

66 (261 to 264)

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<p>26</p> <p>1 conclusions there, correct?</p> <p>2 A. Yes.</p> <p>3 Q. And that's based on the data that you</p> <p>4 provided that we've already discussed?</p> <p>5 A. Correct.</p> <p>6 Q. And the results of your study are, the</p> <p>7 empirical the quantitative part, is dependent upon</p> <p>8 the actual data that was received, so if there</p> <p>9 were any problems with that data, that would</p> <p>10 impact the results of the study?</p> <p>11 A. Correct.</p> <p>12 Q. So let's look at the second then. This</p> <p>13 was your second objective of the -- your second</p> <p>14 objective on page one was to examine other</p> <p>15 relevant evidence to assess whether this evidence</p> <p>16 supports the conclusions of the empirical study.</p> <p>17 And that's what you've done in section five</p> <p>18 beginning on page 24 of your report; is that</p> <p>19 correct?</p> <p>20 A. Correct.</p> <p>21 Q. Who wrote this section of the report?</p> <p>22 A. I did.</p> <p>23 Q. Every word?</p> <p>24 A. Yeah.</p> <p>25 Q. You typed it out yourself?</p>	<p>263</p> <p>1 A. Correct, I did not design a study to</p> <p>2 look at the strength of the trademark.</p> <p>3 Q. And I believe you testified earlier that</p> <p>4 your study did not analyze the strength of VGT's</p> <p>5 trade dress either?</p> <p>6 A. Well, it was not designed to test it</p> <p>7 explicitly. But we talked about that you can</p> <p>8 infer from the strong results on confusion, you</p> <p>9 can infer as to the trademark and trade dress.</p> <p>10 Q. But you cannot infer the trade dress and</p> <p>11 any likelihood of confusion between the trade</p> <p>12 dress of titles other than Mr. Money Bags and New</p> <p>13 Money, correct?</p> <p>14 A. Well, that's a separate topic. That's</p> <p>15 my fifth topic, which is basically to what extent</p> <p>16 you can project the results to the product lines</p> <p>17 beyond the specific item tested.</p> <p>18 Q. Right. But you're talking in general</p> <p>19 here that VGT's trademarks and trade dress of</p> <p>20 their VGT EGMs are strong.</p> <p>21 A. Because the data that I'm reporting here</p> <p>22 does not limit itself to the stimuli used in my</p> <p>23 study.</p> <p>24 Q. Meaning the information that you relied</p> <p>25 upon provided by VGT's attorneys to use?</p>
<p>262</p> <p>1 A. A draft.</p> <p>2 Q. Did you receive an outline of it from</p> <p>3 Covington?</p> <p>4 A. No.</p> <p>5 Q. In your decision to use the various</p> <p>6 materials that you cited here, did you rely upon</p> <p>7 the instructions or advice of VGT's attorneys?</p> <p>8 A. No. I discussed with them, obviously,</p> <p>9 what other available data are there, which led to</p> <p>10 identifying the five topics that I covered under</p> <p>11 this -- this section.</p> <p>12 Q. All right. In section A, the strength</p> <p>13 of VGT -- VGT's EGM trademarks and trade dress,</p> <p>14 you say the stronger the trademarks and trade</p> <p>15 dress the more likely it is that emulation of</p> <p>16 those trademarks and/or trade dress will lead to</p> <p>17 confusion because consumers are more likely to</p> <p>18 remember strong trademarks and trade dress and are</p> <p>19 more likely to associate them with a wide arrange</p> <p>20 of products, and you opine that the evidence</p> <p>21 suggests that the trademarks and trade dress are</p> <p>22 strong.</p> <p>23 And, again, you did absolutely no</p> <p>24 empirical analysis of the strength of VGT's</p> <p>25 trademarks, correct?</p>	<p>264</p> <p>1 A. Right, all the data available from VGT,</p> <p>2 so all the data that I am reporting on pages 25</p> <p>3 through -- I'm missing a page here -- until 31.</p> <p>4 These are data that relate not only to the two</p> <p>5 stimuli I used in my study, but to general</p> <p>6 information relating to VGT.</p> <p>7 Q. When you do a confusion study to</p> <p>8 determine the likelihood of confusion in other</p> <p>9 cases, do you typically include a discussion of</p> <p>10 whether other relevant factors are consistent with</p> <p>11 the survey's conclusions?</p> <p>12 A. To the extent such data are available,</p> <p>13 yes.</p> <p>14 Q. And so we're clear, where did you obtain</p> <p>15 the evidence you considered from?</p> <p>16 A. Well, I asked basically, you know, I</p> <p>17 discussed with counsel what are the variables that</p> <p>18 will support the conclusion based on the</p> <p>19 philosophy of convergence validity; to what they</p> <p>20 extend it to, there are many source of information</p> <p>21 and ideas supporting the same thing, its strengths</p> <p>22 and conclusions we had; identify those five areas</p> <p>23 and ask them to give me all the information</p> <p>24 available about these five areas.</p> <p>25 Q. Okay. Do you have any legal training?</p>

Transcript of Dr. Yoram (Jerry) Wind

67 (265 to 268)

Conducted on September 20, 2018

<p style="text-align: right;">265</p> <p>1 A. No.</p> <p>2 Q. Have you ever served on a jury?</p> <p>3 A. No.</p> <p>4 Q. Do you believe you are qualified to</p> <p>5 weigh the evidence in this case?</p> <p>6 MR. ROMAN: Object to the form.</p> <p>7 A. Not from a legal point of view.</p> <p>8 Q. Yet you've gone through the evidence</p> <p>9 presented to you from VGT's attorneys and based on</p> <p>10 the evidence that you read, not subject to</p> <p>11 cross-examination or counterpoint by Castle Hill,</p> <p>12 you have determined that all of this supports the</p> <p>13 conclusion that Castle Hill has deliberately</p> <p>14 copied machines and infringed upon the trademarks</p> <p>15 and trade dress of VGT; is that correct?</p> <p>16 MR. ROMAN: Object to the form.</p> <p>17 A. Some of the documents concerning the</p> <p>18 copying was documents where, basically, Castle</p> <p>19 Hill, you know, documents and deposition</p> <p>20 testimony; furthermore, the whole procedure is</p> <p>21 based on -- this is based on my best understanding</p> <p>22 of the material I saw.</p> <p>23 To the extent that there is</p> <p>24 counterevidence for this, there are data that</p> <p>25 shows, no, they did not copy, they did not intend</p>	<p style="text-align: right;">267</p> <p>1 every one of my professional life, that's what I</p> <p>2 do.</p> <p>3 Q. If you could turn to page 25 of your</p> <p>4 report. You say, first, I understand that VGT is</p> <p>5 the leading North American developer,</p> <p>6 manufacturer, distributor of class II EGMs, and</p> <p>7 then you cite to that one particular web page that</p> <p>8 you cited in your report --</p> <p>9 A. Right.</p> <p>10 Q. -- that you relied upon.</p> <p>11 And you say I understand that it is</p> <p>12 the leading North American developer, manufacturer</p> <p>13 and distributor of class II EGMs; that it has been</p> <p>14 exclusively using its trademarks and trade dress</p> <p>15 for years, paren, with only relative minor</p> <p>16 variations in its trade dress that have not</p> <p>17 affected the overall commercial impression of the</p> <p>18 products, closed paren, and then you drop a</p> <p>19 footnote to records of the United States Patent</p> <p>20 and Trademark Office; do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. What is the basis for your statement</p> <p>23 that VGT has made only relatively minor variations</p> <p>24 in its trade dress and that they have not affected</p> <p>25 the overall commercial impression of the products?</p>
<p style="text-align: right;">266</p> <p>1 to copy, you know, that's where the rebuttal</p> <p>2 report comes in. So Mr. Berger could have</p> <p>3 included this in his rebuttal report, and were you</p> <p>4 correct here in filming the data.</p> <p>5 Everything I'm saying here is based</p> <p>6 on this data, the data reported here that I</p> <p>7 reviewed and support the case, support basically</p> <p>8 the conclusion of confusion, which my empirical</p> <p>9 study established.</p> <p>10 Q. What in your -- I recognize you have a</p> <p>11 very impressive resume and lots of experience,</p> <p>12 sir. My, I guess my is, what is it in your</p> <p>13 qualifications that you believe makes you</p> <p>14 qualified to review and weigh evidence?</p> <p>15 MR. ROMAN: Object to the form.</p> <p>16 A. I, again, I'm not reviewing them or</p> <p>17 weighing them from a legal point of view. But all</p> <p>18 my professional life, I've been basically looking</p> <p>19 at data. I've been working with many companies in</p> <p>20 consulting, advisory capacity and others, and it</p> <p>21 always involved evaluating data and interpreting</p> <p>22 it. And what does it mean? As a faculty member</p> <p>23 all of these years, that's what it mean in term of</p> <p>24 teaching the evaluation of students' work,</p> <p>25 mentoring, so in every capacity in my writings in</p>	<p style="text-align: right;">268</p> <p>1 A. That's my understanding from the</p> <p>2 discussion and document I looked at. If I'm</p> <p>3 wrong, if there are evidence to the contrary, I'll</p> <p>4 change it.</p> <p>5 Q. Well, we looked at pictures of Mr. Money</p> <p>6 Bags in the sit-down cabinet, right?</p> <p>7 A. Right.</p> <p>8 Q. You remember that?</p> <p>9 A. Yeah.</p> <p>10 Q. And you agree that it was a completely</p> <p>11 different look than the one you showed, but you</p> <p>12 didn't use that because it was the most popular</p> <p>13 you said, right?</p> <p>14 A. Whether it's perceived as different or</p> <p>15 not, it's not my judgment, it should be the</p> <p>16 judgment of consumers.</p> <p>17 And I basically believed that based</p> <p>18 on VGT management belief that they have a</p> <p>19 consistent kind of look and feel over the years.</p> <p>20 I have not seen data to the contrary that will</p> <p>21 show that consumers perceived any of the other</p> <p>22 picture you showed me differently than the one</p> <p>23 that I tested.</p> <p>24 Q. All right. So you got the one you</p> <p>25 tested. You have the one in Exhibit 6 with the</p>